SUPREME COURT OF THE UNITED STATES.

No. 86.

JAMES ERWIN, PLAINTIFF IN ERROR,

vs.

JAMES DUNDAS AND AL.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF ALABAMA.

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J. & G. S. GIDEON, printers.

Pleas had before the honorable the circuit court of the United States for the fifth judicial circuit, and southern district of Alabama, at a term thereof begun and held in and for said district, at Mobile, on the second Monday of March, in the year of our Lord one thousand eight hundred and forty-three, before his honor John McKinley, presiding judge of said court.

Be it remembered, that heretofore, to wit, on the 3d day of March, A. D. 1841, John Doe, who is a citizen of the State of Louisiana, filed before said court his declaration in ejectment against Richard Roe, Charles J. Mansoney, Firman Hurtell, and George R. Griffiths, in the words and figures following, to wit:

Declaration.

The circuit court of the United States for the ninth judicial circuit, and southern district of Alabama, sitting at Mobile, of the term of said court, held on the second Monday of November, 1840.

John Doe, who is a citizen of the State of Louisiana, by his attorneys, complains of Richard Roe, who is a citizen of the State of Alabama, defendant in custody, &c., of a plea of trespass in ejectment, &c.; wherefore the said Richard Roe, with force and arms, &c., broke and entered into a certain close and lot of ground in the city of Mobile, with the appurtenances thereon, &c., which James Erwin, who is a citizen of the State of Louisiana, had demised to the said John Doe for a term which is not yet expired, and ejected him from his said lot and premises, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace and dignity of the United States and the good people thereof. For that, whereas the said James Erwin, who is a citizen of the State of Louisiana, heretofore, to wit, on the third day of November, in the year of our Lord eighteen hundred and forty, at Mobile, in the district aforesaid, did demise to the said John Doe, citizen of Louisiana as aforesaid, the said lot of ground, with the appurtenances, that is to say: all that tract, piece, and parcel of land and premises, situated in the city of Mobile, and in the district and circuit aforesaid, and described as all that certain piece, parcel, or lot of land, lying and being in the lower part of the city of Mobile, and known as Hitchcock's cotton press, bounded on the north by Maine street, on the east by Water street, on the south by Massachusetts street, and on the west by Royal street, with all and singular the appurtenances thereunto appertaining and belonging, the same being premises used and occupied as a cotton press in the said city: To have and to hold the said lot and premises, to the said John Doe and his assigns, from the said third day of November, in the year eighteen hundred and

forty, for and during, and unto, the full end and term of twenty years from thence next ensuing, and fully to be complete and ended. By virtue of which said demise the said John Doe entered upon the said lot and premises, on the day and year last aforesaid, and became, and was thereof, possessed for the said term of twenty years, so to him thereof granted and demised; and the said John Doe being thereof so possessed, the said Richard Roe afterwards, to wit, on the said third day of November, in the year eighteen hundred and forty, with force and arms, &c., entered into the said premises, with the appurtenances which the said James Erwin had devised to the said John Doe, in manner, and for said term aforesaid of twenty years not yet expired, and ejected the said John Doe from his said lot and premises, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace and dignity of the United States and the people thereof. Wherefore the said John Doe saith, that he is injured, and hath sustained damages to the value of fifty thousand dollars; and therefore he brings his suit, &c.

STEWART & EASTON,
Attos. for plaintiff.

To Charles J. Mansoney, Firman Hurtell, and George R. Griffiths, co-partners in the cotton pressing business, under the name and style of F. Hurtell & Co.

Gentlemen: I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or some part thereof; and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear at the next term of our circuit court of the United States for the ninth judicial circuit, and southern district of Alabama, at Mobile, on the second Monday of March, in the year eighteen hundred and forty-one, on the first day of said term, before the judges of said court, by some attorney of said court, and then and there, by rule of the same court, to cause yourselves to be made defendants in my stead, otherwise I will suffer judgment therein to be entered by default, and you will be turned out of possession.

Your loving friend,

RICHARD ROE.

Mobile, *March* 3*d*, 1841.

Filed 3d day of March, A. D. 1841.

DAVID FILES, *Clerk.*

Whereupon, afterwards, to wit, on the 28th day of September, A. D. 1841, the following writ was issued from the office of the clerk of the court aforesaid, to wit:

Writ.

UNITED STATES OF AMERICA:

Circuit court of the United States for the ninth judicial circuit, and southern district of Alabama.

The President of the United States to the marshal of said district, greeting:

You are hereby commanded to take the bodies of Charles J. Mansoney, Firman Hurtell, and George Griffiths, who are citizens of the State of Alabama, and them safely keep, so that you have them before the honorable the circuit court aforesaid at the place of holding said court at Mobile, on the fourth Monday of November next, to answer unto John Doe, who is a citizen of the State of Louisiana, in a plea of trespass in ejectment, &c.

Herein fail not, and have you then and there this writ.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of said cir-
[L. S.] cuit court, this second Monday of March, in the year of our Lord one thousand eight hundred and forty-one.

Issued the 28th day of September, in the year of our Lord one thousand eight hundred and forty-one.

Attest, DAVID FILES,
Clerk C. C. southern dist. of Alabama.

This action in ejectment is to recover of the defendants that certain piece, parcel, or lot of land in the city of Mobile, with the appurtenances, known as Hitchcock's cotton press, bounded on the north by Maine street, east by Water street, south by Massachusetts street, and west by Royal street.

Attest, DAVID FILES,
Clerk C. C. so. district Alabama.

"Received September 29th, 1841, and same day served on Charles J. Mansoney. Executed 19th October, 1841, on F. Hurtell; also executed George Griffith, 16 November, 1841.

"R. L. CRAWFORD, *Marshal.*
"By C. CUYLER, *D. M.*

"Service and return, 7."

And afterwards, to wit, on the 17th day of March, A. D. 1842, the following affidavit was filed in this cause, to wit:

Affidavit of Hindman Barney.

DOE, on demise of ERWIN,
vs.
HURTELL & Co.

Circuit court of U. S. southern district of Alabama.

Hindman Barney, agent and attorney *of* fact of James Dundass, Mordecai D. Lewis, Robert L. Pittfield, Samuel W. Jones, and

Robert Howell, being duly sworn, deposeth and says, that Henry Hitchcock, late of the district aforesaid, deceased, died seised and possessed of the premises in the declaration in the above case described; that previously to the death of the said Hitchcock, to wit, on the 14th day of July, A. D. 1838, he executed an indenture of mortgage, by which he granted and conveyed the said premises to Joseph Cowperthwaite, Thomas Dunlap, and Haman Cope, to secure the payment of the sum of six hundred and twenty thousand five hundred and thirty dollars and ninety-six cents, wherein he was indebted to the said Cowperthwaite, Dunlap and Cope, as he acknowledged by a certain bond or writing obligatory, bearing even date with the said indenture of mortgage; that, on the tenth day of October, 1838, with the consent of the said Cowperthwaite, Dunlap and Cope, the said Hitchcock, by an agreement of lease, demised the said premises to F. Hurtell and C. J. Mansoney, the defendants above named, and who still occupy the same; the said mortgage was forfeited on the first day of March, 1839. That on or about the 13th day of August, 1839, the said Henry Hitchcock departed this life, leaving a last will and testament, whereby he did devise and bequeath to his widow, Mrs. Anne Hitchcock, all his estate, real and personal, in trust, with full power to sell, either at public or private sale, and to convey the same, either for the purpose of paying debts and legacies, or for more advantageous investment therefor; that, in payment of the debt in said bond mentioned, the said Mrs. Anne Hitchcock, trustee as aforesaid, did, by deed bearing date the 8th day of February, 1840, grant and convey to the said Cowperthwaite, Dunlap & Cope, all the estate of the said Henry Hitchcock in the said premises, and also all the interest and estate of the said Henry Hitchcock in the said agreement of lease, so as aforesaid made between him and the defendants F. Hurtell and C. J. Mansoney; that, on the 10th day of February, 1840, the said Hurtell & Mansony, by the firm and style of F. Hurtell & Co., did, in writing by them signed, acknowledge notice of the said conveyances, and also that they, from that time forth, held the said premises as tenants of the said Cowperthwaite, Dunlap & Cope; that, on the eighth day of September, A. D. 1841, the said Cowperthwaite, Dunlap & Cope, by indenture duly executed, conveyed all their estate and interest in the said premises to the said James Dundass, Mordecai D. Lewis, Robert L. Pittfield, Samuel W. Jones, and Robert Howell.

HINDMAN BARNEY.

Sworn to and subscribed in open court, 17 March, 1842.

DAVID FILES, *Clerk.*

Filed 17 March, 1842.

DAVID FILES, *Clerk.*

Affidavit of Hurtell and Mansoney.

In the circuit court of the United States, ninth judicial circuit, southern district of Alabama.

JAMES ERWIN, vs. C. J. MANSONEY, F. HURTELL, AND C. GRIFFITHS. } Ejectment.

Personally appeared in open court, this 19th day of March, 1842, Charles J. Mansoney and Firman Hurtell, defendants, who being duly sworn, say, that on the October, 1838, an agreement was made between them of the one part, and by Henry Hitchcock, of the other, by which said Henry in his lifetime did agree to lease to these affiants the premises known and called by the name of Hitchcock's press, and sued for in this action, a copy of which agreement is herewith produced, marked A; that in pursuance of said agreement, possession of said premises was delivered to them in the lifetime of said Hitchcock, about the time of said agreement, and they became thereby the tenants of said Henry Hitchcock, and so continued until about the 11th of August, 1839, when said Hitchcock died; that said Henry Hitchcock left a will and codicils, which were proved and recorded in the orphans' court of Mobile county, appointing by his said will Ann Hitchcock, his executrix; copy of which *are* herewith shewn, marked B: that after the decease of said Henry Hitchcock, they, these affiants were informed, and believed that said Ann Hitchcock was executrix, having full power to manage and control the estate, real and personal, of said Hitchcock, and that, in accordance with this information and belief, they did consider her as the lawful representative of said Henry Hitchcock, and recognised her authority accordingly.

That under the belief that she was executrix they did, to secure the payment of the rent, execute and deliver to said Ann, mortgages of property, securing to her as executrix the payment of the rent; copies of which are herewith produced, marked C and D. This was done at her request, hastily, in order to enable her as executrix, to pledge the same as security for the payment of an engine which said Hitchcock had contracted for, and which was to be put up in the press, and which the manufacturer would not agree to complete unless security was given, and which engine was very necessary, and they were much interested in obtaining, according to the terms of their lease.

These affiants further shew, that afterwards, they were informed that Mrs. Anne Hitchcock, executrix, had transferred the agreement for the lease above described, to Joseph Cowperthwaite, Thomas Dunlap and Herman Cope, and they were shewn an assignment purporting to be made by Mrs. Anne Hitchcock, as executrix as aforesaid, and were requested to admit themselves to be tenants of said Cowperthwaite, Dunlap and Cope; and under the

belief that said Ann Hitchcock was duly appointed and qualified as executrix, and supposing she had the full control of all the affairs of said estate, and that her assignment was effectual and lawful, they did on or about the tenth day of February, 1840, acknowledge themselves tenants for the unexpired term of the said lease to the said Cowperthwaite, Dunlap and Cope, of said premises, subject to the conditions of an agreement made by Ann Hitchcock with E. C. Center and H. O. Brewer.

Said affiants further shew, that afterwards they learned, that Isaac H. Irwin was appointed administrator with the will annexed of Henry Hitchcock, about the 30 October, 1840, in consequence of the failure or refusal of said Ann to qualify and give bond as executrix, and to comply with the requisitions of the law in respect to executors, and that she in fact never did qualify as such, but on the contrary renounced the office; and further, that said Isaac H. Erwin did qualify as such administrator, with the will annexed; and they further shew, that he, the said Isaac H. did notify them that he alone was the lawful representative of the said estate, and entitled to receive the rents, and to control the said lease, and he forbid these lessees from paying the rents to any other but himself.

These affiants further shew, that upon receiving said notice, they, these lessees, applied to the agent of said Cowperthwaite, Dunlap and Cope, and notified him of this fact, and applied to be indemnified against the claim of said administrator, and all others for rent, and professed themselves willing to pay the proper amount of rent to him, if such indemnity was given; but said agent refused to indemnify these lessees against the claims of others, and demanded to receive the rent without indemnity, which these lessees refused to pay to him without such indemnity.

These lessees further shew, that afterwards James Erwin, the now plaintiff, demanded of them the possession of the said premises, claiming the property under a purchase made by him at sheriff's sale made by the sheriff of Mobile county, under a judgment rendered in the Mobile circuit court in favor of Wm. McGehee use &c. vs. Henry Hitchcock, and affirmed in the supreme court of Alabama, in the lifetime of said Henry Hitchcock, of older date than the agreement of lease made by said Henry Hitchcock to these lessees, and of older date than the supposed mortgage title under which said Cope, Dunlap and Cowperthwaite, derive their claim to said property; and they further shew, that they, these affiants, having refused to deliver up the said possession to him, the said James Erwin, this suit was brought against them in consequence of said refusal.

These affiants further shew that, after the commencement of this suit, the said Cowperthwaite, Dunlap, & Cope, still refusing to give them any indemnity for recognising them as landlords, they were, by the peculiar situation they were placed in, compelled to inquire into the relative rights of the parties respectively, as both

parties pretended to claim of them the rent and possession; and upon such inquiry they were advised that the said James Erwin had acquired, by his said purchase, the better title to said premises, and that the title of said Cope, Dunlap, & Cowperthwaite was void in which opinion they were fortified by the fact that, in a suit in chancery, filed on said mortgage by said Cowperthwaite, Dunlap & Cope, against the said Henry Hitchcock in his lifetime, in the chancery court of Mobile county, the said mortgage was resisted by said Hitchcock as being void, and the chancellor did refuse a motion by them made in said cause to divest the said Hitchcock of his possession of said premises, and to vest the same in a receiver; and said Hitchcock did sustain, in said suit, his right to the possession against said complainants, so far as said suit progressed. And these lessees were further advised, that the attornment made by these lessees to the said Cowperthwaite, Dunlap and Cope, supposing they were bound to do so under the act of Mrs. Hitchcock as executrix, was void, being made under a mistake of fact, and in ignorance of their rights and duties; and because said Ann Hitchcock had no authority, in law or fact, to control the same, as she never did qualify as executrix, and had no authority to make such assignment; that they did disclaim all tenancy under said Cowperthwaite, Dunlap & Cope, while they pretended to hold the said lease, and before their alleged conveyance thereof, and refused to pay them any rents, and refused to acknowledge in them any control or title in the premises; and did, for the causes aforesaid, about the end of April, 1841, agree to recognise the said James Erwin as their landlord and proprietor of said premises, and did surrender the possession to him, and accepted and received from him a lease for said premises, reserving rent to him for a term not yet expired; under which new agreement and demise they ever since have held, and now hold, said possession as tenants of said James Erwin, and not otherwise. They further shew that the said Cowperthwaite, Dunlap, & Cope, never have, nor hath either of them, ever been in the possession of said premises to the knowledge of these affiants at any time, nor the said Dundass and others; and that ever since the said new demise, by the said James Erwin, to them, these affiants, they were, and continued to be, and still are, and claim to be, and now are, tenants of said James Erwin, and of no other person, and have disclaimed and still do disclaim all other tenancy whatsoever, and that their possession of said premises is the possession of said James Erwin, and of none other, and their title to the possession of said premises is wholly inconsistent with the claim of said Cowperthwaite & Co.

These affiants further say that the terms of the agreement for a lease made between said Henry Hitchcock and these affiants were not complied with or performed by said Hitchcock, nor his legal representatives; but the said agreement was broken on the part of said Hitchcock and his legal representatives, by their failure to

perform divers material stipulations contained therein, by reason whereof these affiants were put to great expense, and sustained much loss; that in consequence of the said breach of contract the said agreement was ended and determined; that no lease in form ever was made as contemplated, and said contract became a matter of controversy between these affiants and Isaac H. Erwin, the administrator of Henry Hitchcock, and that the same was finally adjusted between them by said Erwin allowing a certain sum for the losses they claimed, and by their allowing to him all rent up to the time when said property was sold by the sheriff to James Erwin, upon which terms they settled, and paid all arrears of rent due to him, and received compensation for their damages; and that upon said settlement the said agreement for a lease ceased and ended, and the same was as between them cancelled and closed.

F. HURTEL,
C. J. MANSONY.

Sworn and subscribed, in open court, this 19 March, 1842.
DAVID FILES, *C. C. C. S. D. Ala.*

Filed 19th March, 1842.
D. FILES, *C. C. C. S. D. Ala.*

And afterwards, to wit, at a term of the circuit court of the United States, for the ninth judicial circuit and southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of March, in the year of our Lord one thousand eight hundred and forty-two, before his honor William Crawford, judge of said court, on the twenty-second day of March, being a day of said term, the following proceedings were had, to wit:

Order.

"Doe on demise of Jas. Erwin vs. F. Hurtle & Co. } 2,733.

This day came the plaintiff, by his attorneys, and came also James Dundass, Mordecai D. Lewis, Robert L. Pittfield, Samuel W. Jones, and Robert Howell, and claimed to be admitted into the consent rule, and to defend this action as landlords upon the shewing made by them and filed, which motion is resisted by the said plaintiff, and not assented to by the said tenants, as shown by the documents and affidavit filed by said plaintiff in resistance of said motion. And because the presiding judge has been somewhat connected with the documents produced, and may probably be interested in some of the questions involved, the court declines to determine the said motion, and orders the same to be continued over till next term of this court; and the said motion and the said cause are continued."

And afterwards, to wit, at a term of said circuit court of the United States, begun and held in and for said district at Mobile, on the fourth Monday of November, in the year of our Lord one thousand eight hundred and forty-two, on the twenty-ninth day of December, being a day of said term, before his honor, Wm. Crawford, judge of said court, the following proceedings were had, to wit:

Continuance.

DOE on demise of JAS. ERWIN
vs.
F. HURTEL & Co.

It is ordered by the court that this cause be continued. And afterwards, to wit, at a term of the circuit court of the United States, for the fifth judicial circuit, and southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of March, in the year of our Lord one thousand eight hundred and forty-three, on the 25th day of March, being a day of said term, before his honor John McKinley, presiding judge of said court, the following proceedings were had, to wit:

Judgment.

JOHN DOE, on demise of James Erwin,
vs.
RICHARD ROE, HURTEL, MANSONEY, and GRIFFITHS, tenants in possession. } 2,733.

In this cause it was proved, that Charles J. Mansony, Ferman Hurtel, and George R. Griffiths were duly served with copies of the declaration in ejectment in this cause. And also, that at and before and since the filing of said declaration, they were and are in possession of the said premises in the said declaration described. And the said tenants in possession, as well as the said casual ejector, were solemnly called to plead to the said declaration, if they thought proper. And thereupon, James Dundass, Mordecai D. Lewis, Robert L. Pittfield, Samuel W. Jones, and Robert Howell, appear and claim that they are landlords of the said tenants in possession, and pray to be admitted to enter into the consent rule, and for leave to plead not guilty, on the shewing made by the affidavit of H. Barney filed; and the said Hurtel, Mansoney, and Griffiths, tenants in possession, shew cause against the said claim, according to their affidavit filed, and exhibit thereto attached, and resist the said motion, and the said motion is also resisted by the said James Erwin and John Doe, plaintiffs. And the said motion being heard on said affidavits and documents referred, and argument being thereon had, it is considered by the court, that said applicants be admitted to defence against the will of said plaintiffs and tenants. And thereupon, the said James Dundass, Mordecai Lewis, Robert L. Pittfield, Samuel W. Jones, and Robert Howell, appear and

agree, on the trial of the issue, to admit lease, entry, and ouster as charged in the plaintiffs' declaration, and waive the necessity of a new declaration against them, and to plead not guilty only, and rely only on the question of title, and do thereupon file their plea, on which issue is joined; and the said Richard Roe being called, appears not, and makes default, and the said Hurtel, Mansony, and Griffiths being solemnly called to come and plead, if they think proper, came and say they refuse to plead. Whereupon, the said action as to the said casual ejector, and the said tenants in possession, remains wholly undefended: Wherefore, it is considered by the court, that as to said tenants in possession, and said casual ejector, the plaintiff recover his term in the said lands in the declaration described; but that execution thereof be stayed till the further order of this court. And as to said defendants Dundass, Lewis, Pittfield, Jones, and Howell, who have pleaded, came the parties, by their attorneys, and issue being joined, thereupon came also the following jury, to wit:

D. Jones, S. Smith, Wm. Austin, H. Stickney, S. H. St. John, R. Strother, J. F. Hutchinson, J. Silver, Charles S. Shreeve, T. J. Deyampert, John S. Newhouse, and William Edmonds, twelve good and lawful men, who being elected, tried, sworn, and charged to try the issue joined, upon their oaths do say, that we, the jury find the defendants not guilty of the trespasses and ejectments in the said plaintiff's declaration specified, in manner and form as therein set forth. It is therefore considered by the court, that the defendants aforesaid go hence without day, and recover of the said plaintiff their costs by them, in and about their suit, in this behalf expended.

His honor, William Crawford, not sitting in this cause.

Plea of defendants referred to in the foregoing order.

JOHN DOE, on the demise of James Erwin,
vs.
JAMES DUNDASS, MORDECAI D. LEWIS, ROBERT L. PITTFIELD, SAMUEL W. JONES, and ROBERT HOWELL.

The defendants aforesaid, by attorney, come and defend the wrong and injury, when, and say they are not guilty in manner and form as the said plaintiff hath complained against them. And of this they put themselves on the country.

FISHER, GIBBONS & CAMPBELL,
for defendants.

Memorandum.

Be it remembered, that on the trial of this cause, the plaintiff's counsel tendered to the court the following bills of exceptions, which were signed and sealed by the court, and ordered to be made a part of the record, which bills of exceptions are in the words and figures following, to wit:

Bill of exceptions.

Doe on the demise of James Erwin,
vs.
Roe, Hurtel, Mansoney, and Griffiths, tenants in possession.

Circuit court of the United States, Mobile, spring term, 1843.

Be it remembered, that at the spring term, 1843, of this court, James Dundass, Mordecai Lewis, Robert L. Pittfield, Samuel W. Jones, and Robert Howell, appeared before the court by their counsel, and filed the affidavit of H. Barney, which is made part of this bill of exceptions, and moved the court to be admitted to appear and defend the *the* action against the plaintiff by entering into the consent rule, and pleading. The tenants in possession, Hurtell, Mansoney, and Griffiths, resisted the said motion, and shewed cause on oath against the same, which shewing, which is on file, is made a part of this bill of exceptions, together with the documents thereto appertaining and refer*ence* to, and the said motion was also resisted by the plaintiff. Whereupon, the said motion coming on to be heard, the same was argued, and the hearing of said motion was continued from term to term till at this term, when the said motion was argued, and upon argument had, the said motion of the said applicants, claiming to be landlords was granted, and the objections of the said plaintiffs, and of the tenants thereto, were overruled. And the said parties, admitted by the court to defend against the will of the said plaintiff and tenants, and the said tenants thereupon, refused to plead. For all which decisions of the court allowing said motion, the plaintiff excepts, and prays this to be sealed as a bill of exceptions, which is done accordingly.

Signed J. McKINLEY, [SEAL.]

2d bill of exceptions.

Doe, on the demise of Jas. Erwin,
vs.
Roe, Hurtell, Mansony & Griffiths, tenants in possession, and Dundas and others, defendants.

Circuit court of U. States, at Mobile, Spring term, 1843.

Be it remembered, that on the trial of this cause, on the issue joined between the said plaintiff and the said James Dundass, Mordecai D. Lewis, Robert L. Pittfield, Samuel W. Jones, and Robert Howell, who have appeared as landlords, and entered into the consent rule, and pleaded—not guilty; the plaintiff to maintain the title, on his part, produced and gave in evidence the proceedings had in the circuit court of Mobile county, in the State of Alabama, in an action wherein William McGehee, use of, &c., was plaintiff, and Henry Hitchcock was defendant, together with the judgment, executions, sheriff's returns, &c., copies of all which are hereto annexed, mark-

ed A. Also, the proceedings of the supreme court of Alabama on the affirmance of said judgment, a copy of which *are* hereto annexed, marked B. Also, the record of the proceedings in a chancery suit, wherein the said judgment was enjoined, the injunction, &c., copy of which is herewith, marked C. And the sheriff's deed on the sale of the property in controversy by the sheriff of Mobile county, under the said judgment, after the injunction was dissolved, a copy of which is herewith, marked D, showing that the same was purchased by James Erwin.

It further appeared that Henry Hitchcock died on the 13 August, 1839, that at and before the time of the rendition of the judgments he owned in fee simple, and was in the possession of the property sued for, and sold by the sheriff, and continued so till his death, except that he executed a mortgage on the 14th of August, 1838, by which he conveyed the said land to Messrs. Dunlap, Cope and Cowperthwaite, under whom the defendants claim title.

Upon the evidence offered by the plaintiff the court instructed the jury, that the sale by the sheriff was irregular and void, and that by such purchase at the sheriff's sale, under the said judgments, and the executions aforesaid, and the injunction proceedings, the sale and conveyance by the sheriff could convey no title to the plaintiff, and that therefore he was not entitled to recover in this action; to which the plaintiff excepts, and prays the court to seal this as a bill of exceptions, which is done accordingly.

(Signed) J. McKINLEY. [SEAL.]

I, David Files, clerk of the circuit court of the United States for the fifth judicial circuit, and southern district of Alabama, do hereby certify the beforegoing twenty pages to contain a true, full, and perfect exemplification of the record and proceedings in a certain cause, lately pending before said court, wherein John Doe, on the demise of James Erwin, were plaintiffs, and Richard Roe, Hurtell, Mansoney, and others were defendants.

In testimony whereof, at office, in the city of Mobile, I have hereunto set my hand and affixed the seal of said circuit [L. S.] court, this ninth day of December, in the year of our Lord one thousand eight hundred and forty-three.

DAVID FILES,
Clk. C. C. S. D. Ala.

Document A, referred to in the affidavit of Hurtell and Mansony.

A.

It is agreed between F. Hurtel and Charles J. Mansony of the one part, and Henry Hitchcock of the other part, as follows:

Said Hurtel and Mansoney, agree to lease of Henry Hitchcock his new steam cotton press and sheds, and the wharf and water privileges in front thereof, now being erected on the square, bounded by Water, Maine, Royal and Massachusetts streets, for the term

of five years, from the 1st of November next, (1838,) for which they are to pay as follows, viz:

For the first year,	- - - - - -	$12,000
" Second year,	- - - - - -	17,000
" Third year,	- - - - - -	21,000
" Fourth year,	- - - - - -	25,000
" Fifth year,	- - - - - -	25,000
Together making	- - - - - -	$100,000

Payments to be made as follows, viz:

The first year in two equal instalments, on the first day of April, and first day of August.

The 2d, 3rd, 4th and fifth annually, in three equal payments: say 1st March, 1st May, and 1st August, to be secured by the pledge of real and personal estate of the value of twenty-five thousand dollars; Hurtel and Mansony having the privilege of giving up the lease on the 1st day of August, in any year, after the 1st year, on paying twenty-five thousand dollars, in addition to the rent of that year, and notice thereof being given to the said Henry Hitchcock, or his agent, or assignee, on that day.

Henry Hitchcock to have on the 1st day of November, 1838, viz: the engine and press ready for operation, the north shed as far back as 200 feet, ready to receive cotton, and the yard filled and shelled to the same extent. The street and ground in front of the premises to be filled up, shelled with [a] good thick coat of shells even with the wharf and press.

The wharf completed and in good order, and clear of every sort of encumbrance, such as bricks, lumber, shells, &c., &c., except a part of the new part thereof, at the south-east end of the same, which may be used by Henry Hitchcock, until the first day of December, only for the use of the carpenters, landing the bricks, shells, &c.

On the fifth day of November, to have the south shed as far back as 200 feet, ready for operation, and the yard filled and shelled to same extent.

On the tenth of November, to have the other press ready for operation.

On the 15th November, and if possible by the 1st same, to finish off 45 feet square at corner of Massachusetts and Royal streets, for quarters for negroes, store room, forage room, and for stabling 16 horses.

On the first day of December, to have the centre shed, as far back as 155 feet, ready to receive cotton. A set of railway from the delivery doors of the press houses to the wharf, ready for use.

On the first day of January, 1839, to have ready for business the entire sheds, north, west and south, the yard graduated and well shelled.

Mr. Hitchcock promises, if possible, to complete the centre shed by the 1st day of January, 1839.

F. Hurtel and Charles J. Mansony, engage to keep the entire premises, including the engine and screws, boxes and presses, in good order, and to see that they be carefully and properly used; they are to provide good and sufficient engineers to manage with skill and care the engine and presses. All the repairs that may be required to the wharf, and all the new boxes and screws, that may be required, (except to repair injuries by neglect or carelessness) and the re-shelling of the yard, &c., on the 3d, 4th and 5th years, are to be borne equally by said Hurtel and Mansony, and the said Henry Hitchcock.

An omnibus and fire engine, with 5 or 600 feet of hose, and buckets, are to be furnished on joint account, and at the expiration of the lease, the said repairs of wharves, screws and boxes, furnished omnibus and engine, are to be valued, and said Henry Hitchcock is to pay one half of what the same may be worth, over and above what may be considered as keeping them in repair.

During the summer of 1839, Henry Hitchcock engages to reshell the entire yard.

On the first day of November, 1839, to have ready for operation, put up in the north half of the press houses, another steam engine and two sets of presses, with 10 screws and boxes, and such extra cog wheels, pinions, bevils, &c., as is customary to furnish with the engines, and to have the centre shed completed, provided it be not done this year as suggested.

Mobile, 10th October, 1838.

Signed

F. HURTEL,
C. J. MANSONEY,
H. HITCHCOCK.

In the presence of—
C. JEUNELOT,
JOHN HURTEL.

Document B, referred to in the affidavit of Hurtell and Mansony.

In the name of God, I, Henry Hitchcock, of the city of Mobile, and State of Alabama, being of sound and disposing mind, and in the blissful hope of salvation, through the pardoning means of a merciful Saviour, do make and declare this my last will and testament, hereby revoking all former wills and codicils.

1st. After the payment of my just debts, I desire that my aged and respected mother shall, in addition to the lease of the house and lot, and the servants she has during her life, *shall* receive annually, the sum of one thousand dollars, for her comfort and support.

2d. I give and bequeath to my brother, Capt. Ethan A. Hitchcock, the sum of ten thousand dollars.

3d. I give and bequeath to my brother, Samuel Hitchcock, the sum of ten thousand dollars, and I hereby discharge him from all

demands of every kind, which my estate may have against him for monies heretofore advanced.

4th. I give and bequeath to my nephew, William Parkin, the sum of five thousand dollars.

5th. I desire that Augusta and Luintra Hitchcock, now at school at New Haven, under the care of Mrs. Peters, shall be educated at the expense of my estate, and that they shall each receive from my estate, on arriving at the age of eighteen years, the sum of five thousand dollars.

6th. All the above legacies shall be paid (except the last) as soon after my death, and paid as the situation of my estate will admit.

7th. For the purpose of having my estate properly settled and administered during the minority of my children, I do hereby appoint my dear wife Ann my sole executrix, and I do bequeath and devise the same, both real and personal, to her in trust, with full powers to sell, either at public or private sale, all or any part thereof, and the proceeds to re-invest and re-sell at her discretion, either for the purpose of paying my debts and legacies, or for a more advantageous investment, and good and sufficient deeds and conveyances to make therefor. It being my intention and will that my estate shall be kept together, and held in common by my wife for her benefit, and that of my children, until they shall arrive of age respectively; at which time, and as often as any one of them comes of age, he or she is to receive their proportion, it being always understood, that my wife is to receive an equal proportion of my estate with my children; she and they having share and share alike.

8th. Almighty God in his great kindness having intrusted much of this world's goods to my care, I do hereby desire my executrix to appropriate annually for ten years, out of the income of my estate, the sum of five thousand dollars, to be a charge upon the same, to such religious and charitable institutions and purposes, as she may think most suitable and proper. And I hereby remit five thousand dollars of the debt due by my friend, the Rev'd Wm. T. Hamilton, for advances made by me for him, and desire my executrix not to push him for the balance.

In testimony whereof, I have hereto set my hand and seal, this 13th May, 1836.

HENRY HITCHCOCK, [SEAL.]

WM. PHINEAS BROWN,
BENJ. STANTON, JR.,
J. AUSTILL,
D. STOUDER.

Codicil.

Whereas, I, Henry Hitchcock, of the city of Mobile, having made and duly executed my last will and testament in writing, bearing date the thirteenth day of May, 1836, now I do hereby

, that I do this day reaffirm and publish the same, so that it shall include all my estate, real and personal, to this date, except so far as the same is modified by this codicil.

1st. My estate having considerably increased since the date of my will, I hereby authorize my executrix to extend, in her discretion, the donations mentioned in the eighth clause of said will, so as to make the sum ten thousand dollars a year for ten years.

2d. It is my will and desire, that the nett profits of the seventy-five shares of stock standing to my name in the Gordon purchase, after the purchase money and interest has been paid, its use shall be invested in stocks, and the interest thereon appropriated to the establishment of common schools in the city of Mobile, for the education of poor children—that being my original intention in subscribing for said stock.

In witness whereof, I, the said Henry Hitchcock, have to this codicil set my hand and seal, this first day of September, 1836.

HENRY HITCHCOCK, [SEAL.]

In presence of—
WM. EDMOND,
MOSES WARING,
THOMAS S. TURNER.

MOBILE, *August 4th*, 1837.

I hereby make the following as a second codicil to the above will and codicil:

1st. The great revulsion in commercial affairs having greatly embarrassed my estate, and not knowing how it may eventually be settled, I hereby reserve out of my estate, after my just debts are paid, and before any legacies are paid, the sum of twenty thousand dollars for my wife, and the like sum of twenty thousand dollars for each of my children that may be alive at my decease, giving to each the sum of twenty thousand should my estate, after the payment of my debts, be of sufficient value to give them that sum; if not, the same must be divided equally between my wife and children.

2d. Whatever sum may be left after the above is complied with, shall be applied pro rata to the payment of the legacies above specified, pro rata, until they are paid.

3d. My mother having purchased the old family mansion at Burlington, Vermont, where she has settled, the house and servants in this city need not be reserved for her, but the sum of one thousand dollars per annum is to be paid her during her life.

4th. I hereby re-affirm and republish this will in all other respects.

Given under my hand and seal, this 4th August, 1837.

H. HITCHCOCK, [SEAL.]

In presence of—
H. READ,
WM. PHINEAS BROWN,
WM. EDMUND.

MOBILE, 21*st February*, 1838.

3*d codicil.*—Having purchased several pieces of real estate since the date of the last codicil to my will, which bears date the 4th day of August, 1837, I hereby republish the same to take effect from this date, desiring my executrix to carry the same into effect according to the directions of said will, as modified by said codicil.

Witness my hand and seal, the day and year above written.

H. HITCHCOCK, [SEAL.]

Test: W. EDMUND,
HENRY STICKNEY,
WM. P. BROWN.

4*th codicil.*—Being in a low state of health, I have this day reviewed the several testamentary papers heretofore executed by me, and also those which have been cancelled. I have no new testamentary distributions to make, but desire that my will, as it results from four papers heretofore executed by me, shall be carried into effect, giving to each one the proper controul which it should have in point of time. The said four papers are herewith enclosed, and dated as follows:

1st. One dated May 13th, 1836.
2d. One dated September 1st, 1836.
3d. One dated August 4th, 1837.
4th. One dated February 21st, 1838.

They are all in my own handwriting. To the end, therefore, that my said executrix shall have full power to sell, convey, and dispose of real estate, as well as all other property, I again declare my intention, that such power to sell and convey shall extend to all lands acquired since the making of said testamentary papers, as well as to those acquired before. Full power being intended to be given her in this respect.

I do therefore affirm again the said testamentary dispositions, and desire them to be carried into full effect—the last of course controlling previous dispositions when inconsistent.

Given under my hand, this tenth day of August, 1839.

H. HITCHCOCK.

Signed, published, and declared in our presence, as subscribing witnesses, and in presence of each and of all of us together, this tenth day of August, 1839:

JAMES SANFORD,
GEO. N. STEWART,
ISAAC H. ERWIN,
WM. J. LEDYARD.

5 *codicil.*—Having this morning sealed up and closed my will in presence of witnesses, I wish now to provide for an omission, and do so accordingly.

Item. I do hereby give, leave, and bequeath to my worthy friend William Edmund, in consideration of his faithful services, the sum

of five thousand dollars, in addition to his salary of the present year, to be paid out of the proceeds of my mulberry crop of the present year.

Item. I do also give, leave, and bequeath to Bernard Martin, my gardiner, the sum of one thousand dollars, in addition to his salary of the present year, to be paid in like manner out of my mulberry crop of the present year, in consideration of his faithful services.

Item. I wish all my slaves to be furnished with a good plain suit of mourning clothes each.

Witness my hand, this tenth day of August, 1839.—Afternoon.

H. HITCHCOCK.

Witness: GEORGE N. STEWART,
ISAAC H. ERWIN,
WM. J. LEDYARD.

I, David Files, clerk of the circuit court of the United States, for the fifth judicial circuit, and southern district of Alabama, do hereby certify the above and beforegoing nine pages to contain a true, full, and perfect copy of documents A and B, referred to in the affidavit of Hurtel and Mansony, filed before said court on the 19th day of March, A. D. 1842.

In testimony whereof, at office, in the city of Mobile, I have hereunto set my hand and affixed the seal of said circuit [L. s.] court, this ninth day of December, in the year of our Lord one thousand eight hundred and forty-three.

DAVID FILES,
Clk. C. C., So. D. A.

The facts exhibited by the transcript of records produced are as follows:

A.

Wm. McGehee brought an action at law in the circuit court of Mobile county against Henry Hitchcock, and recovered on the 2d day of November, 1836, a judgment on verdict for the sum of three thousand eight hundred and twenty-one dollars.

Henry Hitchcock, on the 21 December, 1836, sued out a writ of error to the supreme court of Alabama to the January term, 1837, of said court, to reverse the decision of the circuit court, and caused the execution to be superseded by giving a bond, with Robert D. James as security, in the usual form, except that it recites a judgment for $3,810 $\frac{00}{100}$, instead of $3,821, as the judgment appealed from.

B.

On the 23d June, 1838, the judgment of the circuit court was by the supreme court of Alabama affirmed, with ten per cent. damages and costs, against Hitchcock and against Robert D. James, his security.

On the 18 of August, 1838, a fi. fa. issued from the circuit court, clerk's office, on the affirmed judgment against H. Hitchcock, and Robert D. James, his security; which writ came to the hands of the sheriff of Mobile county, being for the amount of the debt, besides the 10 per cent. damages. The sheriff endorsed that he received this execution on the 20th August, and levied the same on certain lots in Mobile, as the property of Robert D. James, and returned it to the fall term.

On the 29 Nov'r, 1838, a venditioni exponas issued to the sheriff, commanding him to sell the property, which he had levied, as shewn by his return. To this venditioni exponas, he returned that he had advertised the property for sale, and that on the 2d day of March, 1839, all further proceedings had been stopped by an injunction.

C.

On the 2d of March, 1839, Henry Hitchcock filed in chancery a bill against McGehee, praying, for causes shewn in the bill, relief against the judgment at law, and that the same should be enjoined. On this bill, an order was made for an injunction in the following words:

"On the complainant's executing bond, with good and sufficient security, in double the amount of the judgment at law, let an injunction issue agreeably to the prayer of the bill.

"P. T. HARRIS.

"28*th February*, 1839.

"To the clerk of the circuit court of Mobile county, Alabama."

The complainant, Hitchcock, filed a bond by himself and Wm. Crawford, as his security, in the penal sum of $8,404, payable to McGehee, dated the 2d March, 1839, with a condition which, after reciting the rendition of the judgment, the filing the bill and granting of the injunction, &c., ran in these words:

"Now, therefore, if the said Henry Hitchcock shall pay and satisfy all damages that the defendant Magee may sustain by the wrongful exhibition of said bill, and in all things abide by and perform the ultimate decree, which may be rendered in the cause, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue."

A writ of injunction issued on the 2d of March, 1839, commanding the sheriff to stay proceedings on the execution; on which he returned, that on the same day he desisted from all farther proceedings, and returned the execution as enjoined.

At the fall term of the chancery court, on the 25 Nov'r, 1839, the following order was made in the cause:

"HITCHCOCK
vs.
McGEHEE.

This day came the defendant, by his solicitor, and suggests to

the court, that the complainant has died since the last term of this court; and thereupon it is ordered, on motion of defendant's counsel, that the representatives of the complainant revive the proceedings by bill against the defendant, by the 1st day of April next, or the injunction shall be from thence dissolved, and the defendant have leave to proceed at law."

At the spring term, 1840, the 22d May, 1840, the following order was made:

"At the last term of this court, an order was made suggesting the death of the complainant, and that unless the suit be revived on or before the first day of the next term of said court, that the injunction be dissolved, and no party complainant being made, it is ordered that the suit abate, and that the complainant's administrator, and heirs, and security on the injunction bond, pay the costs."

On the 10th July, 1840, an alias fi. fa. issued on the affirmed judgment at law against Henry Hitchcock and Robert D. James for the amount of the debt, and ten per cent. damages, given on affirmance, which came to the hands of the sheriff of Mobile county; on which he returned, that he had levied on the land, (now the subject of this action of ejectment) as the property of Henry Hitchcock, pointed out to him by Isaac H. Erwin, executor of H. Hitchcock, deceased; and that, on the first Monday of November, 1840, he had sold the said land to James Erwin, who was the highest bidder, for four thousand five hundred dollars.

D.

The sheriff, on the day of his sale, executed a deed to James Erwin, the now plaintiff, for the land so sold, and now sued for, which was duly recorded, conveying to him the said land as purchased at sheriff's sale under said judgment and execution. Henry Hitchcock died 13th August, 1839.

C and D abbreviated, referred to in the affidavit of H. and M.

On the 22d August, 1839, two mortgages were made by Hurtel and Mansoney of certain real and personal estate, to secure the payment by them for the rent for the press. These mortgages bear date as above. They recite that, whereas by an agreement, dated the 10th October, 1838, Henry Hitchcock agreed to demise to Mansony and Hurtel, and Mansoney and Hurtel agreed to hire and rent of said Henry Hitchcock for five years, from the 1 Nov., 1839, the cotton press; and whereas Mansony and Hurtel agreed to secure the payment of the rent according to the terms of said agreement by a pledge of real and personal estate; that Hurtel and Mansony in consideration of the premises, and of one dollar in hand paid by Ann Hitchcock, executrix of Henry Hitchcock, convey to her, the said Ann, executrix, the property mortgaged, the condition is, that if they shall pay said Ann Hitchcock, executrix, the rent, &c., then to be void; else of full force and effect.

On the 15 October, 1839, Ann Hitchcock, as executrix, made a deed, whereby she transferred the lease and mortgage to Center and Brewer, as trustees, to secure to the West Point Foundry the payment of an engine they were then building for the press.

I, David Files, clerk of the circuit court of the United States, for the fifth judicial circuit, and southern district of Alabama, do hereby certify the beforegoing four pages to contain a true, full, and perfect copy of the abbreviations of certain documents referred to in the affidavit of Hurtel and Mansony, and the bill of exceptions filed in this cause; which said abbreviations now remain on file in my office.

In testimony whereof, at office, in the city of Mobile, I have hereunto set my hand and affixed the seal of said circuit [L. S.] court, this ninth day of December, in the year of our Lord one thousand eight hundred and forty-three.

DAVID FILES,
Clk. C. C. So. D. Ala.

For value received, I hereby assign, transfer, and set over to J. Cowperthwaite, Thomas Dunlap, and Thomas Cope, the survivor and survivors of them, and the executor, administrator, and assigns of each survivor, all the right, title, interest, and estate, of the late Henry Hitchcock, and all my right, title, interest, and estate of, in, to, or out of the foregoing agreement, between Edward C. Center and Henry O. Brewer and myself, and also the three several instruments of writing in said agreement mentioned, which were deposited with the said Brewer & Center, as collateral security for the payment of a certain promissory note in the said agreement specified, they the said Cowperthwaite, Dunlap, & Cope, holding the said agreement, and the document therein named, as fully and completely as the said Henry Hitchcock, or myself, did, might, or could do. Witness my hand and seal, this 10th day of February, 1840.

Signed, ANNE HITCHCOCK, [SEAL.]
Signed, sealed, and delivered, in presence of
Test: WM. EDMOND,
EDW. HITCHCOCK.

We acknowledge we have received notice of the assignment before mentioned; and that we acknowledge that we are tenants of the within named Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, of the unexpired term of the lease within mentioned, subject only to the condition of the aforestated agreement with E. C. Center & H. O. Brewer.

Signed, F. HURTEL & CO.
Mobile, 10th February, 1840.

I, David Files, clerk of the circuit court of the United States, for the fifth judicial circuit and southern district of Alabama, do hereby

certify the beforegoing one page to contain a true, full, and perfect copy of a document filed in the beforestated cause, and now remaining on file in my office.

In testimony whereof, at office, in the city of Mobile, I have hereunto set my hand and affixed the seal of said circuit [L. s.] court, this ninth day of December, in the year of our Lord one thousand eight hundred and forty-three.

DAVID FILES,
Clk. C. C. So. D. Ala.

"It is further agreed that, in order to abbreviate the lengthy documents, exhibited and referred to in the bills of exceptions in this cause, the parties have set forth the same only in part, and abbreviated and recited said proceedings in part; all of which are agreed to be the substance and material part of said documentary proof, as set forth in this record, and are to be taken in lieu of the original documents by consent in this cause.

STEWART & EASTON,
Attos. for plff.
JAS. ERWIN,
JNO. A. CAMPBELL,
For the defendants Dundass et al."

Mobile, December 13, 1843.

I, David Files, clerk of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, do hereby certify the above to be a true copy of an agreement entered into by the counsel in this cause, and filed in my office; which said abbreviations, &c., referred to in said agreement, are contained in the latter part of this transcript.

In testimony whereof, at office in the city of Mobile, I have hereunto set my hand, and affixed the seal of said circuit [L. s.] court, this 13th day of December, A. D. 1843.

DAVID FILES,
Clk. C. C. So. D. Ala.

Writ of error to the circuit court of the United States for the fifth judicial circuit, southern district of Alabama.

DOE, on the demise of JAMES ERWIN
vs.
JAMES DUNDASS, M. D. LEWIS, R. L. PITTFIELD, SAM'L W. JONES, & ROBT. HOWELL.

We hereby agree to waive the necessity of the issuance and service of a citation in this cause, and consent that the same be placed on the trial docket of the Supreme Court of the United States at the next term thereof, to be held in the city of Washington, on the